

Fall 1983

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Recommended Citation

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MENS REA AS AN ELEMENT NECESSARY FOR CAPITAL PUNISHMENT

*Enmund v. Florida*¹

In an attempt to establish a relationship between culpability and capital punishment, the United States Supreme Court has directly addressed the issue of the mens rea required to impose the death penalty. In *Enmund v. Florida*,² the Court examined application of the death penalty in a case where the defendant did not kill, did not intend the victims' deaths, did not anticipate the use of lethal force, and was absent from the scene. The defendant was found guilty of aiding and abetting a robbery, which provided the basis for his felony-murder conviction.³ The Court has recently discussed the importance of considering the defendant's intent in sentencing.⁴ In *Enmund*, the Court emphasized that intent is also an element necessary for capital punishment. The Court did not, however, specify the mens rea required before the death penalty can be constitutionally imposed.

Thomas and Eunice Kersey were robbed and fatally shot outside their home. The evidence showed that Sampson and Jeanette Armstrong had gone to the Kersey home under the pretext of borrowing water for their overheated car. When Mr. Kersey brought the water, Sampson took him at gunpoint and told Jeanette to take his money.⁵ Mrs. Kersey, hearing her husband's cries for help, emerged from the house and shot Jeanette. Sampson and possibly Jeanette returned the fire, killing Mrs. Kersey and her husband. The Armstrongs robbed the bodies and fled to a waiting car.⁶

The evidence showed that Earl Enmund's car was used in the robbery. Two witnesses testified they they had seen a man sitting in the car around the time the robbery occurred.⁷ Although the extent of Enmund's participation in the robbery was disputed,⁸ the Florida Supreme Court concluded

1. 102 S. Ct. 3368 (1982).

2. *Id.*

3. See note 10 and accompanying text *infra*.

4. See, e.g., *Mullaney v. Wilbur*, 421 U.S. 695, 699 (1975).

5. 102 S. Ct. at 3370.

6. *Id.*

7. *Id.*

8. The trial judge concluded that he was a major participant, finding that Enmund had planned the robbery, shot the Kerneys, and disposed of the weapons. *Enmund v. State*, 399 So. 2d 1362, 1372 (Fla. 1981), *rev'd*, 102 S. Ct. 3368 (1982). The Florida Supreme Court found that Enmund had only driven the getaway car, but affirmed the finding of an absence of mitigating circumstances. *Id.* at 1370,

that the jury could have found that Enmund was in the car waiting to help the Armstrongs escape.⁹

Enmund and Sampson Armstrong were tried together and found guilty on two counts of first degree murder and one count of robbery.¹⁰ The trial court accepted the jury's recommendation of the death penalty for both defendants.¹¹ The Florida capital sentencing statute¹² listed aggravating and mitigating circumstances, and the trial court applied only aggravating circumstances to Enmund's sentence: (1) the murders were committed while he was engaged in or assisted an armed robbery,¹³ (2) the murders were committed for pecuniary gain,¹⁴ (3) the murders were especially heinous, atrocious or cruel,¹⁵ and (4) Enmund had a previous conviction for a felony involving violence.¹⁶

The Florida Supreme Court held that two of the four circumstances did not apply.¹⁷ First, the court decided that the pecuniary gain and armed robbery factors were to be treated as a single circumstance. Second, the court found no evidence indicating that the murders were especially heinous.¹⁸ Nevertheless, the court found no mitigating circumstances, and affirmed the imposition of the death penalty.¹⁹

The United States Supreme Court questioned whether the sentence was unconstitutionally disproportionate to the crime, given that Enmund neither killed nor intended to kill, and that he did not anticipate the use of

1372. The United States Supreme Court majority construed this as negating the trial court's findings of Enmund's role in the robbery. The dissent, however, believed that despite the Florida Supreme Court's finding that Enmund did not pull the trigger, the court had implicitly recognized that Enmund played more than a minor role. 102 S. Ct. at 3389 n.36. The majority argued that the degree of Enmund's participation was irrelevant, because the Florida Supreme Court held that Enmund's driving of the getaway car was enough to warrant the death penalty. *Id.* at 3371 n.2. Participation is important, however, in light of the Florida statute, which weighs it as a mitigating circumstance.

9. Enmund v. State, 399 So. 2d at 1370.

10. *Id.*

11. *Id.*

12. FLA. STAT. ANN. § 921.141 (West Supp. 1981).

13. *Id.* § 921.141(5)(b). See Breedlove v. State, 413 So. 2d 1 (Fla.), *cert. denied*, 103 S. Ct. 184 (1982).

14. FLA. STAT. ANN. § 921.141(5)(f) (West Supp. 1981).

15. *Id.* § 921.141(5)(h). See Alford v. State, 307 So. 2d 433 (Fla. 1975), *cert. denied*, 428 U.S. 912 (1976).

16. FLA. STAT. ANN. § 921.141(5)(b) (West Supp. 1981). See White v. State, 403 So. 2d 331 (Fla. 1981); Lewis v. State, 398 So. 2d 432 (Fla. 1981). The trial court found no mitigating circumstances. 399 So. 2d at 1370. See FLA. STAT. ANN. § 921.141(6) (West Supp. 1981) (seven mitigating factors).

17. 399 So. 2d at 1373.

18. *Id.* See Francois v. State, 407 So. 2d 885 (Fla. 1981), *cert. denied*, 102 S. Ct. 3511 (1982).

19. 399 So. 2d at 1373. See also Hall v. State, 403 So. 2d 1321 (Fla. 1981).

lethal force.²⁰ Based on the eighth and fourteenth amendments, the Court held the sentence was unconstitutional and reversed.²¹ The Court observed that the penalty could not deter crimes similar to Enmund's,²² and found that Enmund's responsibility and moral guilt did not justify retributive application of the death penalty.²³

The history of the felony-murder rule helps place the *Enmund* decision in perspective. The common law rule originated to deter criminals from negligently or accidentally killing while committing felonies.²⁴ Almost half of the states classify felony-murder with premeditated murder as a capital offense.²⁵ While premeditated murder requires the "conscious object" to kill, most felony-murder statutes require only that the defendant have the intent to commit the underlying felony. This intent is the equivalent of premeditation.²⁶ The rule is particularly important during sentencing. In jurisdic-

20. 102 S. Ct. at 3368.

21. *Id.* at 3376-77. See U.S. CONST. amend. VIII (prohibits cruel and unusual punishments). The eighth amendment was applied to the states through the fourteenth amendment in *Francis v. Resweber*, 329 U.S. 459, 463 (1947). The sentence was disproportionate because Enmund did not commit or intend the killings, nor did he anticipate that lethal force would be used. 102 S. Ct. at 3377.

22. 102 S. Ct. at 3378.

23. *Id.*

24. 40 AM JUR. 2D *Homicides* § 71 (1968).

25. See, e.g., CAL. PENAL CODE §§ 189-190 (West Supp. 1982); FLA. STAT. ANN. §§ 775.082(1), 782.040(1)(a) (West 1976 & Supp. 1982); IND. CODE ANN. §§ 35-5-2-3(b), 35-42-1-1 (Burns Supp. 1981); TENN. CODE ANN. § 39-2402(a), (b) (Supp. 1981). In these jurisdictions, first degree felony-murder does not require malice aforethought or intent to kill, even though second degree murder requires intent. In seven other jurisdictions, intent is required for a felony-murder conviction. See ALA. CODE §§ 13A-2-23, 13A-5-40(a)(2), (b)-(d), 13A-6-2(a)(1) (1977 & Supp. 1981) (intentional killing); ILL. ANN. STAT. ch. 38, § 9-1(a)(3), (b)(6) (Smith-Hurd 1979) (intent or knowledge of strong probability of death); LA. REV. STAT. ANN. § 14.30(1) (West 1982) (specific intent to kill); OHIO REV. CODE. ANN. §§ 2903.01(B)-(D), 2929.02(A), .04(A)(7) (Page 1982) (accomplice must purposely cause death); TEX. PENAL CODE ANN. §§ 12.31, 19.02(a)(1), 19.03(a)(2) (Vernon 1974) (intentionally or knowingly cause death); UTAH CODE ANN. §§ 76-5-202(1)(d), -10(a) (Supp. 1981) (willful, deliberate, and premeditated). Three jurisdictions require that the felony-murderer actually kill to commit a capital offense. See ILL. ANN. STAT., ch. 38, § 9-1(a)(3), (b)(6) (Smith-Hurd 1979); MD. ANN. CODE, art. 27, §§ 410, 412(b), 413(d)(10), (e)(10) (1982); VA. CODE §§ 18.2-10(a), -18, -31(d) (Supp. 1981).

26. See 40 AM. JUR. 2D *Homicide* § 72 (1968). For Florida cases where only intent to commit the underlying felony was proven, see *Jacobs v. State*, 396 So. 2d 1113 (Fla.), cert. denied, 454 U.S. 933 (1981); *DeLoach v. State*, 388 So. 2d 31 (Fla. Dist. Ct. App. 1980). Felony-murder convictions have been upheld even when the death is accidental. See, e.g., *State v. Edwards*, 122 Ariz. 206, 594 P.2d 72 (1979) (victim suffered fatal heart attack during armed robbery, defendant convicted of robbery, burglary, and first degree murder), *rev'd on other grounds*, 451 U.S. 477 (1981). For criticism of the felony-murder rule, see O. HOLMES, *THE COMMON*

tions like Florida, the felony-murderer enters the sentencing procedure bearing an aggravating circumstance—the aiding in or commission of a felony.²⁷ If this circumstance is not mitigated, the death penalty can be constitutionally imposed.²⁸

The trial court's findings regarding Enmund's participation differed from the findings of the Florida Supreme Court,²⁹ but the state supreme court found the evidence sufficient to support the felony-murder conviction and the death sentence without examining the question of Enmund's intent. Thus, *Enmund* gave the United States Supreme Court an opportunity to examine whether capital punishment constituted cruel and unusual punishment when the defendant did not intend to kill, kill, or anticipate that lethal force would be used. The Court applied the analysis of *Coker v. Georgia*³⁰ to decide the question.

Coker held unconstitutional punishment which: (1) is grossly dispropor-

LAW 57-59 (1881); Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50 (1956); Mueller, *Criminal Law and Administration*, 34 N.Y.U. L. REV. 83 (1959); Prisig, *Proposed Revision of the Minnesota Criminal Code*, 47 MINN. L. REV. 417 (1963); Comment, *The Constitutionality of Imposing the Death Penalty for Felony Murder*, 15 HOUS. L. REV. 356 (1978); Note, *Criminal Law*, 23 WAYNE L. REV. 504 (1977).

27. FLA. STAT. ANN. § 921.141(5), (6) (West Supp. 1981). *Id.* § 921.141(5)(d) lists as an aggravating circumstance that the "felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit any robbery." See *Breedlove v. State*, 413 So. 2d 1 (Fla. 1982) (felony in course of which murder is committed is a constitutionally permissible aggravating circumstance).

28. Although statutory aggravating circumstances can be considered during sentencing, see *Combs v. State*, 403 So. 2d 418 (Fla. 1981), *cert. denied*, 102 S. Ct. 2258 (1982), there is no limitation on considering mitigating circumstances. The sentencing authority must consider *all* mitigating factors in punishment, whether provided by statute or not. *Lockett v. Ohio*, 438 U.S. 586 (1978). See also *King v. State*, 375 So. 2d 1069 (Fla. 1979), *cert. denied*, 447 U.S. 912 (1981); *Songer v. State*, 365 So. 2d 696 (Fla. 1978). If there are no mitigating factors, the felony-murderer may be sentenced to death solely because the murder took place during a felony. See *Alford v. State*, 307 So. 2d 433 (Fla. 1975), *cert. denied*, 428 U.S. 912 (1976). Concurring in *Proffitt v. Florida*, 428 U.S. 242 (1976), Justice White found that statutory circumstances are not merely advisory. He contended that Florida law required the death penalty in all first degree murders where aggravating circumstances were not mitigated. The alternative was unfettered discretion in capital sentencing, which was found unconstitutional in *Furman v. Georgia*, 408 U.S. 238 (1972). 428 U.S. at 260 (White, J., concurring).

29. 399 So. 2d at 1370. The trial judge had found that Enmund was one of the killers based on the fact that two guns were used and that Jeanette Armstrong had been wounded. *Id.* at 1372. The United States Supreme Court decided that the Florida Supreme Court did not sustain this finding. 102 S. Ct. at 3371 n.2 (citing 399 So. 2d at 1372).

30. 433 U.S. 584 (1978).

tional to the severity of the crime, or (2) makes no measurable contribution to an acceptable punishment goal and thus is a purposeless infliction of suffering.³¹ Capital sentences must satisfy both tests.³²

The *Enmund* Court observed that proportionality must not be based solely on judges' moral values,³³ but on objective criteria that reflect the public attitude,³⁴ including legislative judgments,³⁵ international opinion,³⁶ and jury sentences.³⁷ The Court considered the number of jurisdictions that would have imposed the death penalty on felony-murderers who had not actually killed or intended to kill.³⁸ The Court concluded that this standard weighed against imposing the death penalty.³⁹ The Court was divided, however, in counting the jurisdictions that would impose the death penalty in a similar case. The majority found that only nine jurisdictions would have given *Enmund* the death penalty,⁴⁰ while the minority found twenty-four.⁴¹

The Court next examined the eighth amendment's history. While conceding some deference to legislatures, the Court held that it was the ultimate arbiter of whether a punishment is constitutional.⁴² This judicial power can be determinative in cases like *Enmund*, where the objective crite-

31. *Id.* at 592.

32. *Id.*

33. 102 S. Ct. at 3372. See *Coker v. Georgia*, 433 U.S. 584, 592 (1977); *Gregg v. Georgia*, 428 U.S. 153, 173-74 (1976); *Furman v. Georgia*, 408 U.S. 238, 411 (1972) (Blackmun, J., dissenting).

34. *Gregg*, 428 U.S. at 173.

35. 102 S. Ct. at 3372. There is some danger in this approach. First, legislators may tailor statutes to fit prior court decisions. Second, not all laws accurately reflect public opinion, and it is doubtful whether the public understands the felony-murder rule. See Comment, *supra* note 26, at 373. In *Robinson v. California*, 370 U.S. 660 (1962), the Court indicated that the question was whether the public, if fully informed, would condemn the punishment. *Id.* at 666. See Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1780-82 (1970).

36. 102 S. Ct. at 3376 n.22.

37. The Court concluded that juries have refused to apply the death penalty in cases like *Enmund*. *Id.* at 3375.

38. *Id.* at 3374-75. In *Coker*, the Court relied heavily on this standard. It struck down the death penalty for rape, finding that only three jurisdictions permitted capital punishment for raping an adult woman. 433 U.S. at 592.

39. 102 S. Ct. at 3374-75.

40. *Id.* at 3372.

41. *Id.* at 3390 (O'Connor, J., dissenting). The dissent characterized the majority's figures as "curious." For example, the majority did not count six statutes that include as a statutory mitigating circumstance the defendant's minor participation in a capital felony committed by another. *Id.* at 3374-75 n.15. FLA. STAT. ANN. § 921.141(6)(d) (West Supp. 1981) provides that an accomplice's minor participation is a mitigating circumstance.

42. 102 S. Ct. at 3376. See *Furman v. Georgia*, 408 U.S. at 313-14 (White, J.,

ria are not dispositive.⁴³ "[N]othing less than the dignity of man" underlies the Eighth Amendment.⁴⁴ Punishment should be "graduated and proportioned to the offense."⁴⁵ These principles form the touchstones of constitutional punishment analysis.⁴⁶ Therefore, consideration of a defendant's personal culpability and the circumstances surrounding the crime is "constitutionally indispensable."⁴⁷

The Florida statute was flawed in this respect, for it treated all the *Enmund* defendants alike; it attributed the Armstrongs' culpability to Enmund.⁴⁸ The key was Enmund's blameworthiness, not the culpability of those who shot the victims.⁴⁹ The Court recognized that Armstrong had committed murder and thus could constitutionally receive the death penalty.⁵⁰ The issue was not, however, whether the death penalty was disproportionate to the murder, but whether it fit robbery, the only offense that Enmund had committed.⁵¹

The Court could have decided the case solely on the first *Coker* test and found that the death penalty was disproportionate to Enmund's conviction for robbery.⁵² Nevertheless, the Court addressed the second *Coker* test: whether giving Enmund the death penalty measurably contributed to an acceptable punishment goal.⁵³ The Supreme Court has recognized two legitimate goals for punishment: deterrence and retribution.⁵⁴ Capital pun-

concurring); *Trop v. Dulles*, 356 U.S. 86, 103-04 (1958); *Weems v. United States*, 217 U.S. 349, 378-79 (1910).

43. See 102 S. Ct. at 3390 (O'Connor, J., dissenting). The dissent found that legislative judgments indicated that "our evolving standards of decency" still embrace capital punishment for this crime. *Id.*

44. *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

45. *Weems v. United States*, 217 U.S. 349, 367 (1910).

46. See *Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 305 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972); Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980).

47. *Woodson v. North Carolina*, 428 U.S. at 309. See *Bell v. Ohio*, 438 U.S. 637 (1978); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Roberts v. Louisiana*, 428 U.S. 325 (1976); Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97 (1979); Comment, *supra* note 26, at 385.

48. 102 S. Ct. at 3377.

49. *Id.* at 3378.

50. *Id.* at 3377.

51. *Id.*

52. In *Coker*, the Court invalidated the death penalty statute based solely on the first prong. 433 U.S. at 588. See Comment, *supra* note 26, at 360 n.31 (*Coker* did not hold that the death penalty would not be retributive or deter rape and this highlighted the significance of proportionality as distinct from a punishment's rational utility when determining constitutionality).

53. 102 S. Ct. at 3377.

54. See *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

ishment can deter only murders based on premeditation and deliberation.⁵⁵ In *Enmund*, the Court found the death penalty had no deterrent value because the defendant had no intent to kill.⁵⁶ The Court also recognized that over the past twenty-five years, no felony-murderer who had not killed, attempted to kill, intended the victim's death, or anticipated the use of lethal force had been given the death penalty, although three persons had been sentenced and were awaiting punishment.⁵⁷ A penalty imposed so rarely could not be a credible deterrent.⁵⁸

The Court also rejected retribution as a justification. Although retribution is no longer considered the primary objective of penology,⁵⁹ it is not necessarily inconsistent with a respect for the dignity of man.⁶⁰ The criminal justice system recognizes that mens rea is a condition to punishment.⁶¹ The Court found it fundamental that "causing harm intentionally must be punished more severely than causing the same harm unintentionally."⁶² The death penalty is not invariably disproportionate to the crime of deliberately taking a life.⁶³ Capital punishment is "an extreme sanction, suitable to the most extreme of crimes."⁶⁴ Yet an unintentional felony-murder is not as extreme a crime as a premeditated killing. Punishing both crimes with the same penalty, the Court found, would not "measurably contribute to the retributive end of insuring that the criminal gets his just deserts."⁶⁵

55. 102 S. Ct. at 3377. The threat of the death penalty may have the opposite effect. *A* and *B* rob a store and during the robbery *V*, the store's proprietor, grabs the gun and the weapon fires, killing *A*. Assuming that *B* is familiar with the law of felony-murder (which must be assumed in any discussion of deterrence), *B* now has an incentive to kill *V* to eliminate her as a witness. See *People v. Mitchell*, 61 Cal. 2d 353, 360, 392 P.2d 526, 530, 38 Cal. Rptr. 726, 730 (1964); Comment, *supra* note 26, at 378.

56. 102 S. Ct. at 3377 (citing *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting)).

57. 102 S. Ct. at 3376.

58. *Id.* at 3378. See *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring).

59. See *Powell v. Texas*, 392 U.S. 514, 538-39 (1968) (retribution is not mentioned in the Court's discussion of the function of criminal sanctions); *Williams v. New York*, 337 U.S. 241, 248 (1949) (same); see also C. BLACK, *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* 23-24 (1974); Marcus & Weissbrodt, *Comment: The Death Penalty Cases*, 56 CALIF. L. REV. 1270 (1978).

60. *Gregg*, 428 U.S. at 183. See also Berns, *Defending the Death Penalty*, 26 CRIME AND DELINQ. 503 (1980).

61. See *Robinson v. California*, 370 U.S. 660 (1962); *Morisette v. United States*, 342 U.S. 246 (1952); H. HART, *PUNISHMENT AND RESPONSIBILITY* 230 (1968).

62. 102 S. Ct. at 3377 (quoting H. HART, *supra* note 61, at 162).

63. *Gregg v. Georgia*, 428 U.S. 153 (1976).

64. *Id.* at 187. Some would apply the death penalty only to deliberate killings. See, e.g., Vellenga, *Christianity and the Death Penalty*, in *THE DEATH PENALTY IN AMERICA* 129 (1964).

65. 102 S. Ct. at 3378.

Based on the *Coker* tests, the Court concluded that Enmund's punishment violated the eighth and fourteenth amendments.⁶⁶ The holding invalidates statutes that ignore the defendant's mens rea and impose the death penalty on felony-murderers who do not intend or attempt to kill. Conversely, if the defendant intends to kill and death results, the death penalty is constitutionally permissible.⁶⁷ *Enmund* leaves open, however, the question of whether the felony-murderer who kills without intent can constitutionally be given the death penalty. Given the Court's emphasis on individual culpability and moral guilt,⁶⁸ it seems that an accidental killing cannot be punished with the death penalty, even though it occurs during the commission of a felony.

Another question is whether defendants like Sampson Armstrong, who kill in response to armed resistance, can be given the death penalty. Proof of a "conscious object" cannot be a prerequisite to capital punishment, or all felony-murder laws would be unconstitutional. *Enmund* indicates that some analysis of the defendant's intent is required.⁶⁹ In Sampson's case, the defendant's intent to kill may be inferred from the taking of the life. This is what Justice White concluded, concurring in *Lockett v. Ohio*.⁷⁰ He acknowledged that the death penalty may not be constitutionally imposed unless the defendant had the "purpose to cause the death of the victim."⁷¹ It is rare that the person pulling the trigger lacks the intent to cause the victim's death.⁷² Thus it is unlikely that *Enmund* prevents applying the death penalty to one who actually kills during a felony.

Finally, *Enmund* leaves open the case where a felony-murderer only anticipates that lethal force will be used to commit the crime. Enmund may have been subject to the death penalty had he planned the robbery and disposed of the murder weapons.⁷³ Defendants who anticipate the use of lethal force may have enough culpability to justify constitutional application of the death penalty. A recent case, *Newlon v. Missouri*,⁷⁴ supports this conclusion. In *Newlon*, two men robbed a store and the owner was killed. The evidence was unclear as to which defendant pulled the trigger.⁷⁵ Both were convicted of capital murder and sentenced to death.⁷⁶ The Supreme Court denied certiorari, Justices Marshall and Brennan dissenting.⁷⁷ Jus-

66. *Id.* at 3379.

67. *Gregg*, 428 U.S. at 186.

68. 102 S. Ct. at 3376-77.

69. *Id.* at 3379.

70. 438 U.S. 586 (1978).

71. *Id.* at 624.

72. *Id.* at 625 n.7.

73. 102 S. Ct. at 3391 n.40.

74. 103 S. Ct. 185 (1982), *denying cert. to* State v. Newlon, 627 S.W.2d 606 (Mo. 1982).

75. State v. Newlon, 627 S.W.2d 606, 609 (Mo. 1982).

76. *Id.*

77. 103 S. Ct. at 185.

tice Marshall, relying on *Enmund*, found the *Newlon* jury instructions on guilt impermissible because the verdict could have been based solely on accomplice liability.⁷⁸ Justice Marshall could not determine whether any separate findings had been made on Newlon's culpability for the murder.⁷⁹

Newlon is distinguishable from *Enmund*. Newlon, whether or not he pulled the trigger, was an equal participant in the robbery. There was evidence that before the crime his accomplice had raised the possibility of shooting the owner to avoid detection, and there was evidence that Newlon supplied the murder weapon.⁸⁰ These factors indicate that Newlon at least anticipated the use of lethal force. By denying certiorari, perhaps the Court has implied that anticipation of use of lethal force may constitutionally justify imposition of the death penalty, even if it is not clear that the defendant has done the killing.⁸¹

States should look to *Enmund* and evaluate their death penalty statutes. The case is particularly important because it is the first time the Court has discussed intent in a death penalty context, and only the second time the Court has decided a capital punishment case on substantive grounds.⁸² It is difficult to formulate objective criteria in this area, but the majority arguably achieved this goal by grounding its holding on objective legislative criteria. The decision also shows the Court's willingness to depart from looking

78. *Id.* at 186-87 (Marshall, J., dissenting).

79. *Id.* The jury was instructed as follows:

If you find and believe from the evidence beyond a reasonable doubt:

First, that . . . the defendant *or another* caused the death . . . by shooting . . . , and

Second, that the defendant *or another* intended to take the life . . . , and

Third, that the defendant *or another* knew that they were practically certain to cause the death . . . , and

Fourth, that the defendant *or another* considered taking the life . . . and reflected upon this matter coolly and fully before doing so, and

Fifth, that the defendant acted either alone or knowingly and with common purpose together with another in the conduct referred to in the above paragraphs, then you will find the defendant guilty of capital murder.

627 S.W.2d at 613 (emphasis added).

80. *Id.* at 611.

81. A more recent Missouri case explains what evidence is required to find an accomplice had the intent necessary to be convicted of capital murder. In *State v. Betts*, 646 S.W.2d 94 (Mo. 1983) (en banc), the court held that if a defendant knew others were "practically certain to commit a capital murder" during the commission of a felony, he has the same intent as the active participants, including knowledge, premeditation, and deliberation. *Id.* at 97.

82. The first was *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty disproportionate punishment for rape of adult woman).

only at procedure in death penalty cases and evaluate moral guilt and its relationship to the theory of punishment.

NANCY A. MCKERROW